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No. 81-2373

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIP GAZIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the removal of corporate records from the corporation's offices and their subsequent presentation to the FBI, all of which was carried out by a corporate employee acting upon her own initiative, constitutes an official search subject to the requirements of the Fourth Amendment.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1982. The petition for a writ of certiorari was filed on June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of a motion to suppress evidence and a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner and co-defendants Alfred Royster, Jr. and Suncrest Environmental Resources, Inc. were each convicted of two counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 1 and 2), twelve counts of using interstate facilities in furtherance of commercial bribery, in violation of 18 U.S.C. 1952 (Counts 3-12, 16, 17), and one count of conspiracy to commit mail fraud and to use interstate facilities in furtherance of commercial bribery, in violation of 18 U.S.C. 371. In addition, petitioner was convicted of one count of attempting to obstruct the grand jury investigation, in violation of 18 U.S.C. 1510 (Count 18), and one count of attempting to suborn perjury before the grand jury, in violation of 18 U.S.C. 1503. Petitioner was sentenced to a total of five years imprisonment and fines amounting to $142,000. The court of appeals affirmed petitioner's conviction.

1. The evidence at trial showed that between late 1977 and mid-1979 Suncrest Environmental Resources Corporation sold coal to the West Penn Power Company. During that period petitioner, the owner and president of Suncrest, paid co-defendant Royster, a West Penn employee, to substitute samples of different, higher quality, coal for samples taken from the coal actually delivered by Suncrest to West Penn for use in its plant. The purpose of this scheme was to raise the price West Penn paid Suncrest for the coal, which, under the governing contracts, was dependent upon the results of a laboratory assay of the samples.

West Penn operated a coal-fueled power plant on the Monongahela River at Hatfield, Pennsylvania, and pur-

chased coal for the plant from several independent suppliers, including Keystone Coal Associates. Keystone, in turn, subcontracted West Penn's order to Suncrest (Tr. 2-6, 98-103, 168-169, 395-396).[1] Suncrest shipped the coal from mines in West Virginia by barge downriver to the West Penn plant's unloading facility (Tr. 1190, 1269-1270). When a shipment of coal arrived, West Penn employees would remove a 4000 gram "sample" of the coal from the shipment and place it in a locked "library deposit box." The sample would later be sent to West Penn laboratories, where its quality would be tested; West Penn paid a higher price for better quality coal (Tr. 10-15, 52-81, 167-175).

Although tests performed on petitioner's coal shipments during the period in question indicated that the coal was of excellent quality, West Penn employees began to suspect that the Suncrest coal actually utilized by the power plant was of poorer quality than the tests showed. The price Suncrest charged was too low for high quality coal, and the actual coal from the shipments themselves appeared to be of poorer quality; it clogged up the furnaces when burned (Tr. 179-180, 238-239, 396-398, 565-566). Accordingly, West Penn officials began to take additional samples from the barges as they came in, had them analyzed, and compared the test result with the test results of the regular "library deposit box" samples. Company officials realized that someone had been switching samples in the "library deposit box" when they discovered that the deposit box sample was of consistently higher quality than the special barge sample (Tr. 181-182, 400-403, 450-455, 566-570, 591-632, 707-720).

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[1] "Tr." denotes the trial transcript. "H. Tr." denotes the transcript of the suppression hearing.

The evidence further revealed that petitioner regularly instructed Henrietta Foster, who was employed as a secretary at Suncrest, to give the identification numbers of Suncrest barges bound for the West Penn plant at Hatfield to a man named "Fred" whenever he called. Petitioner later admitted to Foster that he had an "inside" man named Fred who worked for West Penn in the Hatfield barge unloading area and helped him with the samples (Tr. 790-791, 991-993). Petitioner would pay "Fred" for his services by issuing company checks payable to certain individuals and forging the signatures. Foster would then cash the checks and return the cash to petitioner (Tr. 1001-1007). Evidence at trial showed that "Fred" was co-defendant Alfred Royster, Jr., who worked at the Hatfield barge unloading facility. In late July 1979, after Foster was served with a grand jury subpoena, petitioner was tape-recorded admitting that he made payoffs to Royster and attempting to persuade Foster to lie to the grand jury (Tr. 1029, 1247-1248, 1272). Evidence also showed that petitioner pressured an answering service and a travel agency to destroy or alter records pertaining to Royster (Tr. 1021-1022, 1132-1145, 1158-1160).

2. Prior to trial, petitioner moved to suppress documents removed from Suncrest offices by Henrietta Foster.[2] At the suppression hearing, Foster

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[2] The government used six items obtained by Foster in preparation for its case. Four of the items (Gov't Exh. 35-38) related only to an obstruction of justice count (Count 21) that was dismissed by the district court at the conclusion of the government's case. The remaining items were a travel agency receipt (Gov't Exh. 18-A) and a list of telephone numbers and payments made to Royster (Gov't Exh. 23-4). This list was not a corporate record, but rather was a copy made by Foster of a record that she had made and maintained (Tr. 1032-1033).

testified that she took documents from the Suncrest office prior to July 1, 1979, and kept them at her home until July 17, when she showed them to FBI Agent Richard Geitgey (H. Tr. 6-7).[3] Geitgey had never met Foster before July 17 and had not requested that Foster remove the documents (H. Tr. 13). At their first meeting, after viewing the documents, Geitgey declined to accept them because he was unable to contact his superiors. Accordingly, he told Foster that they would meet again, but gave her no instructions regarding the documents (H. Tr. 12, 26, 36-37).[4] Foster took the documents back home on July 17 and quit her job on July 24, 1979 (H. Tr. 12, 24, 26). The FBI contacted Foster on approximately July 27, and Foster turned the records over to the FBI on July 30 (H. Tr. 34, 43, 9-10). The district court found that Foster did not act as a government agent in any of her actions (H. Tr. 56).

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[3] Foster's fellow employee, Jay Lynch, called Geitgey at Foster's request on June 29 and made arrangements for the July 17 meeting (H. Tr. 14-16). During the course of the conversation, Lynch explained that he and Foster wanted to show Geitgey some documents. During the July 17 interview, Foster indicated that petitioner was destroying certain records and that she was afraid that some of the documents she had brought with her were also going to be destroyed. Accordingly, Geitgey photocopied several of the documents on July 17, but did not photocopy any of the items actually introduced at trial because Foster believed that those documents were not about to be destroyed (H. Tr. 47-50).

[4] As petitioner acknowledges (Pet. 13), Foster did not assist the FBI in procuring the incriminating tape recording of petitioner (see page 4, *supra*) until after she had presented the documents to the FBI. The latter act was her initial contact with the FBI (H. Tr. 13).

ARGUMENT

Petitioner argues that Foster acted as a government agent when she turned over the Suncrest records to the FBI and that her conduct accordingly constituted an official search subject to the requirements of the Fourth Amendment. Petitioner advances two arguments in support of that claim: first, that an FBI agent instructed her to bring the records to him on July 30 after she had previously attempted to give them to him on July 17 (Pet. 19-23), and second, that she was motivated by the hope of securing beneficial governmental treatment when she first took the records from the Suncrest office (Pet. 24-26). Neither argument establishes petitioner's claim.

As petitioner concedes (Pet. 20), the Fourth Amendment applies to private searches only if the private party acts as an agent of the government. *Walter* v. *United States*, 447 U.S. 649, 656 (1980); *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). To be sure, the government may not circumvent the Fourth Amendment by instigating searches by private parties. Nonetheless, a mere intent to assist the government or hope of reward is not sufficient to turn a private search into a government search. See, *e.g.*, *United States* v. *Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975); *Meister* v. *Commissioner*, 504 F.2d 505, 508-510 (3d Cir. 1974).

In petitioner's case, there is no basis for a conclusion that the government was involved in Foster's decision to remove corporate records. There was no contact between Foster and the FBI before Foster took the records; neither did the FBI have advance knowledge that Foster would remove the documents. Moreover, there was no reason for Foster to believe that her action would curry favor with the government, since she was not informed of the FBI investigation until after she had taken the documents home.

In fact, Foster specifically denied that she had taken the documents in order to protect her own interests (H. Tr. 19-20, Tr. 1073).

Contrary to petitioner's argument (Pet. 19), the fact that Agent Geitgey did not accept the records until several days after Foster had first presented them to him did not convert her search into an official search, because Geitgey did not participate in Foster's original private search and seizure. Unlike *United States* v. *Haes*, 551 F.2d 767 (8th Cir. 1977), upon which petitioner relies (Pet. 21-22), here the government agent did not perform an additional search after Foster turned over the records, but merely accepted the results of Foster's already completed private search. Compare 551 F.2d at 771. *Walter* v. *United States*, *supra*, is similarly inapposite, because in that case the government performed an additional search by screening obscene films after receiving them in opened cartons from a private party to which they had been mistakenly delivered. See 447 U.S. at 656. See also *United States* v. *Jacobsen*, 683 F.2d 296, 298-300 (8th Cir. 1982).[5] In any event, as petitioner recognizes (Pet. 21), the determination whether an

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[5] Nor do district court decisions cited by petitioner (Pet. 22-25) support his claim. Indeed, as the excerpt reproduced in the petition (Pet. 23) makes clear, *United States* v. *Bloom*, 450 F. Supp. 323, 326 (E.D. Pa. 1978), teaches only that official participation may be presumed (and then only rebuttably) where the government "has contacted the private individual" prior to the search. It is undisputed that that did not happen here. And in *United States* v. *Stein*, 322 F. Supp. 346 (N.D. Ill. 1971), the informer who supplied documents to federal agents that were suppressed had continuing contact with the agents prior to the time he secured the documents. The district court found "a clear pattern of * * * attempts to procure [the informer's] cooperation" in securing documents of evidentiary value. 322 F. Supp. at 348. That finding fully distinguishes *Stein* from the present case.

ostensibly private search is rendered "official" is highly dependent upon the facts of a particular case. Because this case entails no more than the application of settled principles to a particular fact pattern, review by this Court is clearly unwarranted.

Further review is also unwarranted because the evidence in both of the documents used at trial in connection with counts upon which petitioner was convicted (see page 4 note 2, *supra*) duplicated other evidence presented at trial, and any error in their use was accordingly harmless. Information contained in the travel agency receipt was also included in separate records obtained directly from the travel agency (Tr. 1132-1146). Foster's testimony duplicated the information contained in the list of payoffs and telephone numbers. Foster testified that petitioner had told her that he made payoffs to Royster, and the government introduced a tape recording in which petitioner admitted making profits (Tr. 996-997, 1000-1004, 1272). Foster further testified that petitioner had given her the very telephone numbers that were contained in the documents and explained that they were Royster's phone numbers (Tr. 996-997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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